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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2066

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, *et al.*,

Petitioners,

v.

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, which is reported at 494 F.2d 987, is printed in Appendix A to the petition for certiorari previously filed herein. Appellants were originally granted judgment by the United States

District Court for the District of Columbia. The opinion of the District Court, which is reported at 357 F.Supp. 509, is printed in Appendix B to the petition for certiorari.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 11, 1974. A petition for writ of certiorari was filed in this Court on July 23, 1974. This Court granted the petition on January 27, 1975. This Court has jurisdiction to review the judgment herein by a writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the procedures adopted by the Secretary of the Interior for assessing civil penalties under the Federal Coal Mine Health and Safety Act of 1969 are in conflict with the procedures specified in section 109(a) of that Act?

2. Whether, under the Federal Coal Mine Health and Safety Act of 1969, the Secretary of the Interior may assess civil penalties against mine operators without making and publishing factual findings?

STATUTE AND REGULATIONS INVOLVED

This case involves interpretation of section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 819(a), the pertinent portions of which are printed in the Appendix at p. 2.

The procedural regulations of the Secretary of the Interior dealing with assessment of civil penalties, codified as Title 30 Code of Federal Regulations, Part 100, are reproduced in the Appendix at p. 4.

STATEMENT OF THE CASE

The Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act) established safety and health standards for underground coal mines, and vested in the Secretary of the Interior the authority to enforce such standards.

The Act provides in section 109(a)(1) that the operator of a coal mine in which a violation occurs shall be assessed a civil penalty by the Secretary of the Interior in an amount not in excess of $10,000 for each such violation, and that in determining the amount of the penalty the Secretary shall consider six factors, namely, the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation.

The procedure for assessing civil penalties is spelled out in section 109(a)(3). It provides:

> "A civil penalty shall be assessed by the Secretary *only after* the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. . . . Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code." (Emphasis added).

At the time the Act became effective in March 1970 the Secretary delegated his penalty assessment functions to the Interior Department Board of Mine Operations Appeals, and published procedural rules which provided for initial adjudication of penalty cases by a hearing examiner, with a right of appeal to the Board.[1] These rules provided that "Where the Examiner (or the Board) has found that a violation of a mandatory health or safety standard or any other provision of the Act has occurred, he shall determine the amount of the penalty which is warranted and incorporate in the decision concerning the violation an order requiring that the penalty be paid."[2] The rules further specified that such

[1] Title 30 C.F.R. Part 301, published March 25, 1970; Federal Register, Vol. 35, pp. 5255-5258. These regulations were subsequently recodified as 43 C.F.R. Part 4, section 4.540 et seq.

[2] 30 C.F.R. section 301.53(e); revised and recodified as 43 C.F.R. section 4.545.

decisions "shall include a statement of findings and conclusions and the reasons or basis therefor, on the material issues of fact, law or discretion presented on the record."[3]

If these procedural rules had been adhered to there would have been no occasion for the initiation of the present action.

Some nine months later, however, the Secretary adopted an entirely different procedure for assessment of civil penalties, designated as 30 C.F.R. Part 100,[4] by which he delegated his penalty assessment functions to "an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines."

Briefly stated, the Part 100 regulations established a summary type procedure whereby the assessment officer, before any determination as to whether a charged violation had in fact occurred, served upon the mine operator a proposed penalty assessment order and advised him that if he failed to protest such penalty assessment within 15 days he would be deemed to have waived his right to protest and to a formal adjudication, and the proposed penalty assessment would become the final assessment order of the Secretary. If the operator filed a protest the assessment officer had authority to amend or reissue the assessment order, and it the operator failed to pay the amended or reissued order or petition for a hearing within 20 days he was sent a

[3] 30 C.F.R. section 301.83; revised and recodified as 43 C.F.R. section 4.546.

[4] Federal Register, Vol. 36, No. 11, January 16, 1971; Appendix, p. .

form letter advising him that the assessment order had become final and would be processed for enforcement in an appropriate District Court of the United States under section 109(a)(4) of the Act. (Appendix p. 2).

The record in the district court showed, and the court found, that under this procedure the assessment officer issued proposed assessment orders solely on the basis of unproved violation notices written up by mine inspectors, and without any finding as to the existence of an actual violation or any meaningful consideration of the six statutory criteria specified in section 109(a)(1) for determining the amount of the penalty. The court noted that assessment orders "seem to issue forth from a clerical machinery completely divorced from any genuine process of considered determination as to each case." 357 F.Supp. at 512.

In deposition testimony the assessment officer, Everett Turner, admitted that in issuing proposed assessment orders he made no independent determination that the charged violation had in fact occurred, but simply accepted the mine inspector's notice of violation at face value. His testimony on this point was, in pertinent part, as follows:

> (p. 341) Q Now, if the notice of violation states on its face what appears to be a description of a violation of a safety or health standard, do you pursue that any further, or do you accept that statement as representative of the existence of a violation?
>
> A We accept that if it states a violation as threatened in the description.
>
> * * *

> (p. 342) Q You do not find, though, that a violation did in fact occur; is that correct, other than your determination that what appears on the notice purports to charge the occurrence of a violation.
>
> A That is right.

The printed form used by the assessment officer in issuing proposed penalty assessment orders (Appendix p. 46) contained a boiler plate statement that consideration had been given to the six statutory criteria, but the evidence showed the contrary. The assessment officer admitted that "in the majority of cases" he adhered to a schedule contained in Appendix A to the Part 100 regulations, irrespective of the size of the mine.[5] A sample tabulation of 376 proposed assessment orders showed virtually no differential between penalties assessed against large mines and small mines for similar types of charged violations. For example, for alleged "accumulations of loose coal and coal dust" the same minimum amount ($5000) was assessed against mines employing five or six men and producing no more than 50 tons of coal a day as was assessed against 500 man mines producing as much as 6000 tons a day.[6]

After the operator had been notified that the assessment order had become final, and the case was to be transmitted to the Department of Justice for enforcement action, the clerical staff of the assessment office filled in the blank spaces on a pre-printed form

[5] Transcript of Everett Turner deposition, pp. 112-114.

[6] See Appendix Document J to Plaintiffs' Statement of Material Facts As To Which There Is No Genuine Issue.

bearing the facsimile signature of the assessment officer, reading as follows:[7]

"I HEREBY FIND THAT THE VIOLATIONS CITED IN THE _____ PROPOSED ORDER OF ASSESSMENT DATED _____ DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

EVERETT TURNER
ASSESSMENT OFFICER

Mr. Turner's deposition testimony regarding findings of fact was as follows:

(p. 47) Q. In making the proposed assessments, do you make any written findings regarding the factual information, findings of fact regarding the alleged violation, or any findings respecting the various criteria that are specified – written findings I am talking about – such as size of the mine, whether the operator was negligent, past history of violations, the effect of the assessment upon the operator's ability to stay in business, or the operator's good faith in correcting the violations?

(p. 48) A. We do not make any written record as findings.

(p. 352) Q. Now, this form, which you have just identified as the form which is used when the case is referred to the Justice – the finding-of-fact form, which is used when the case is referred to the Department of Justice.

This is a printed form, is it not, Mr. Turner?

[7]A reproduction of this form appear at Appendix p. 45.

A. Yes; it is.

Q. And it has your name printed on it; right?

A. That one does; yes.

Q. And this is the form that has been used.

A. That is the form that has been used.

(p. 353) Q. Now, we will go back to the point where you have issued a proposed order of assessment.

When you send the proposed order of assessment to the operator you also send him a covering letter, do you not, which states that if he does not protest the order or ask for adjudication within 20 days, the order will become the final assessment order of the Secretary.

A. That is right.

Q. So now if an operator does not respond at that state, you then proceed to refer the case to the Solicitor's office; is that correct?

A. Well, the first step we take following that – and that is 20 days from his receipt of the proposed order or amended proposed order we issued, we allow time for the protest or his correspondence, and then we send him a letter telling him that it has become the final order of the Secretary because of his failure to respond.

(p. 354) Q. You send him what would be called a finality letter.

A. Yes.

Q. At the time you issue the finality letter to him, do you make any finding of fact; do you render any decision or notification within the record in the assessment file to the effect that a violation has in fact occurred?

A. Not at that stage. We tell him he has ten days to pay the amount or we will refer it to the Justice Department or the Solicitor's office for collection under the Federal Claims Collection Act.

Q. Now, if he fails to pay, do you then prepare the file for submission to the Solicitor's office?

A. Yes.

* * *

(p. 355) Q. And is it at that stage that you include in the file or you attach to the file this form that is marked as Exhibit No. 25?

A. At that stage – yes.

Q. Now, the finding of fact consists simply of this one sheet, this printed form –

A. That is the statement; yes.

From the time of adoption of the Part 100 regulation in January 1971 to June 1972 the assessment officer issued 7805 proposed orders of assessment for a total of $20,234,211, or an average of almost $2600 for each initial proposed assessment order.[8]

In granting summary judgment for the plaintiffs the district court concluded that the Part 100 procedures did not comply with the statutory requirements of section 109(a) of the Act. The court rejected the government's argument that all that is required is that the operator be given an "opportunity" for an adjudicatory hearing, and where he does not request a hearing the Act does not require that the Secretary issue a decision incorporating his findings of fact that a violation did occur and the amount of the penalty

[8]Turner deposition, p. 47.

which is warranted. The Court held that Section 109(a)(3) does not allow for defaults against the operator, and that it is the Secretary's responsibility to see that the statutory requirements are fulfilled in all cases, even where the operator does nothing. As stated by the Court:

> "In all cases before an assessment order can become final, the Secretary must (1) meaningfully consider the six statutory criteria for penalty assessment, (2) make express determinations thereon with regard to the amount of the penalty which is warranted, and (3) make express determinations that a violation did occur. Express determinations are to be made 'by decision incorporating his findings of fact therein.'" 357 F.Supp. at 512.

Upon appeal the Court of Appeals for the District of Columbia Circuit reversed the judgment of the district court, and held that where the mine operator does not request a formal hearing he has waived his right to a hearing, and the Secretary has no obligation to issue a decision incorporating his findings of fact either as to the occurrence of a violation or the application of the six statutory criteria.

SUMMARY OF ARGUMENT

The penalty assessment procedures adopted by the Secretary under his Part 100 regulation are contrary to the procedures expressly prescribed in Section 109(a)(3) of the Act in that they authorize the issuance of penalty assessment orders before any determination is

made that a charged violation actually occurred, and without any genuine consideration of the statutory criteria for determining the penalty amount.

The district court properly held that Section 109(a)(3) requires in all cases, whether the mine operator has exercised his opportunity for a hearing or not, that the Secretary must make findings of fact as to the occurrence of a violation and the appropriate penalty. The Court of Appeals was in error in holding that the Act does not require findings of fact where the operator has not requested a hearing.

The decision of the Court of Appeals is inconsistent with the clear and unambiguous intent of the statutory language as well as the overwhelming weight of judicial authority.

ARGUMENT

THE SECRETARY'S PART 100 ASSESSMENT PROCEDURE IS IN DIRECT CONFLICT WITH THE PROCEDURAL REQUIREMENTS EXPRESSLY MANDATED BY THE ACT

The assessment of fines or penalties is an adjudicative function. As such it necessarily involves the process of making a determination in the first instance that some event has occurred which calls for imposition of a fine or penalty. Such a determination requires, in turn, an examination into the factual situation relating to the alleged event, and findings respecting the same. Under established rules governing agency adjudicative functions

such determinations must be made in writing, and must include "A statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."[9]

The language of Section 109(a)(3) of the Act is completely consistent with these recognized standards for adjudication of penalties. It requires that before a civil penalty is assessed there must be both an opportunity for a hearing and a determination by the Secretary that a violation occurred and the appropriate amount of the penalty.

The requirement for a *determination* respecting the occurrence of a violation and the appropriate penalty for such violation is an integral and indispensable part of the assessment function mandated by the statute. To read Section 109(a)(3) as requiring nothing more than an "opportunity for a hearing" is to dispense with the essential element of the adjudicative function with which the Secretary is charged under the Act, namely, the obligation to *determine* in any particular case whether there was in fact a violation for which the mine operator should be assessed a penalty, and how much that penalty should be.

The Secretary's obligation to provide the opportunity for a public hearing is not an alternative to his duty to perform his adjudication function. He cannot properly contend that he has discharged his adjudication function simply by giving the person charged with a violation an opportunity for a public hearing, and, having done that, he is relieved of the duty of making

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[9] Administrative Procedure Act, 5 U.S.C. sections 554, 557.

factual determinations. The statutory language requires him to make a factual determination respecting both the occurrence of the alleged violation and the amount of the penalty which is appropriate to such violation under the circumstances of the particular case.

The powers of an administrative agency must be exercised in accordance with, and in the mode prescribed by, the statute creating such powers, and an administrative agency cannot rightly dispense with any of the essential forms of proceedings which the legislature has prescribed in investing it with the power to act. *Burlington Truck Lines v. United States,* 371 U.S. 159, 9 L.Ed. 2d 207 (1962); *Atchison, T and S.F. Ry. v. Wichita Board of Trade,* 412 U.S. 800, 37 L.Ed. 2d 350 (1973); *Peters v. Hobby,* 349 U.S. 331, 99 L.Ed. 1129 (1955); *Stark v. Wickard,* 321 U.S. 288, 88 L.Ed. 733 (1944). In *CAB v. Delta Airlines,* 367 U.S. 316, 6 L.Ed. 2d 869 (1961) the Court held that an attempt by an agency to exercise a power without compliance with the procedural provisions laid down in the statute as to the manner of its exercise is a nullity.

Section 109(a)(3) of the Federal Coal Mine Health and Safety Act could not be more explicit in its requirements that civil penalties may be assessed *only after* the person charged with a violation has been given an opportunity for a public hearing *and the Secretary has determined,* by decision incorporating his findings of fact, that a violation did occur, and the amount of the penalty warranted.

It is manifest that the assessment procedures authorized by the Part 100 regulation do not comply with this statutory standard for administrative action. Under the Part 100 procedures the assessment officer's

proposed penalty order is issued in advance of any determination that there was in fact a violation, and if the mine operator doesn't protest it or request a hearing within a given number of days the order ripens into a final assessment order of the Secretary without any findings of fact having been made respecting the occurrence of a violation or the appropriate penalty for such violation. The "finding of fact" entered by the assessment officer after the assessment order has become final is nothing more than a *pro forma* conclusory statement which recites no underlying facts and gives no indication as to the grounds on which the "finding" was made. As stated by the district court, "To allow the simple forms now employed for this purpose to suffice would be to make a mockery of the express statutory language requiring a 'decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted.'" 357 F.Supp. at 512.

The language of this Court in the Burlington case, *supra,* is applicable here. In setting aside an order of the Interstate Commerce Commission, the Court noted:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. Expert discretion is the life-blood of the administrative process, but unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government can become a monster which rules with no practical limits on its discretion. . . . The agency must make

findings that support its decision, and those findings must be supported by substantial evidence." 371 U.S. at 167.

In *Atchison, T and S.F. Ry. v. Wichita Board of Trade, supra,* the Court elaborated further upon the essential nature of agency findings, and noted that, in order to determine whether the course followed by the agency is consistent with its mandate from Congress,

> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong. And we must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process. Only in that way may we guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." 412 U.S. at 806. (Citations omitted).

In the present case the assessment officer's own description of the penalty assessment procedures under Part 100 demonstrates an almost total indifference to administrative due process and a flagrant disregard for the procedural requirements of the Act. He flatly admitted that the procedures of his office under Part 100 made no provision for documentation of the grounds upon which assessment actions are taken or the extent to which consideration had been given, if at all, to the six statutory criteria for determining penalty amounts.

This lack of documentation for assessment actions was a major point of criticism incorporated in a General Accounting Office report of its investigation into the functioning of the assessment office in early 1972.[10]

[10]Report No. B-170686 dated July 5, 1972 entitled "Improvements Needed in the Assessment and Collection of Penalties – Federal Coal Mine Health and Safety Act of 1969." This report is part of the record in the district court below as Exhibit No. 4 to Deposition of Defendant Elburt Osborn.

This report stated (p. 25) that the GAO investigators sampled 400 violations assessed by the assessment office, and that:

> "Because of the lack of any written guidelines defining the factors and describing the consideration and weight to be given each and the lack of documentation on the consideration given to each of the factors, we were unable to determine the adequacy of the consideration given to the six factors and the basis for the penalties assessed in these sample cases.

The report concluded (p. 27) that:

> "Proposed orders of assessment should be reviewed on a test basis by Assessment Office officials to evaluate assessor performance. However, documentation on how the penalty amount was determined was inadequate. The assessment worksheets, the only documentation of the assessment action, listed only the health and safety standards violated and the dollar amounts of the initial assessment and the reassessment for each penalty. There was no documentation showing how or whether the assessor considered (1) the six factors in arriving at the penalty amount or (2) the mine operator's protest when reassessing the case. In our opinion, such documentation is necessary for assessment officials to understand the reasoning behind an original assessment and to facilitate a management evaluation of an assessor's performance and of the overall assessment function."

The district court noted that this failure of the assessment officer to provide adequate documentation disclosing the reasons for his assessment orders deprived the penalized mine operator of his right to be apprised of the grounds for the action taken against him so that

he might be in a position to effectively respond or to defend himself against such action. The court stated:

> "Under the present procedure the operator has no notice of what facts under the statutory criteria entered into determination of a violation or a proposed penalty, and thus no basis on which to know whether he should or should not object, either as to the violation or the penalty. The initial burden at present is upon the operator to show why a possible arbitrary finding of violation or penalty is not appropriate, rather than being upon the Secretary to make a considered determination of violation and appropriate penalty." 357 F.Supp. at 513.

The Court of Appeals for the Third Circuit reached a similar conclusion in *Morton v. Delta Mining Inc.* 495 F.2d 38 (1974), where the Secretary of the Interior was seeking enforcement of penalty assessment orders issued under the Part 100 procedures. That case involved an appeal by the Secretary from three district court judgements denying enforcement on grounds that the Part 100 procedures did not comply with the statutory requirements. The Secretary contended that the statutory language requiring a "decision incorporating his findings of fact therein" applies only where the mine operator has requested a hearing, but the Court of Appeals rejected this contention and held that the language of Section 109(a) (3) requires that, whether or not the operator requests a hearing, "The assessment must be made by the Secretary's decision incorporating his findings of fact that a violation did occur and the amount of the penalty which is warranted."[11] The Court concluded that:

[11] 495 F.2d at 41.

> "Findings of fact, explicit and public, are necessary to assure that the administrative process not degenerate into arbitrariness or, worse, into discrimination and spite. Thus, though flexibility and the capacity to make rapid determinations are vital weapons in every administrator's arsenal, we cannot assume in the absence of adequate explanation that proper standards are implicit in every exercise of administrative discretion. Judicial review is rendered practically impossible, or at least vastly more difficult, where the agency decision is not accompanied by express findings." 495 F.2d at 42.

As we have previously noted supra, the Secretary originally interpreted Section 109(a) (3) as requiring adjudicatory findings and decisions in all penalty assessment cases under the Act, and delegated to the Interior Department Board of Mine Operation Appeals the responsibility for penalty assessments under regulations which called for initial adjudication of penalty cases by a hearing examiner, with a right of appeal to the Board, and required that the examiner or the Board issue a decision incorporating findings of fact and conclusions of law respecting the occurence of a violation and the amount of the penalty.[12]

In setting up this procedure the Secretary was following the statutory mandate, as well as established rules of administrative practice. When he subsequently reversed his ground and adopted the informal short-cut method of assessing penalties under Part 100 he exceeded his statutory authority and breached the

[12] 30 C.F.R. Part 301, section 301. 83; subsequently recodified as 43 C.F.R. Part 4, section 4.545.

elemental standards recognized as essential to administrative due process.

THE DECISION OF THE COURT OF APPEALS IN THE PRESENT CASE CANNOT BE RECONCILED WITH THE OVERWHELMING WEIGHT OF THE COURT'S OWN PRIOR DECISIONS

In an almost unbroken line of administrative law cases the Court of Appeals for the District of Columbia Circuit has held that administrative determinations are not valid unless supported by adequate findings of fact and reasoned opinions. The Court's pronouncements on this point have been most frequent and emphatic. For example, in *USV Pharmaceutical Corp. v. Secretary of HEW* 466 F.2d 455 (D.C. Cir. 1972) it stated:

> "As we have frequently emphasized, findings of fact are not mere procedural niceties; they are essential to effective review of administrative decisions. Without findings of fact a reviewing court is unable to determine whether the decision reached by an administrative agency follows as a matter of law from the facts stated as its basis, and whether the facts so found have any substantial support in the evidence." 466 F.2d at 462.

In *Greater Boston Television Corp. v. FCC* 444 F.2d 811 (D.C. Cir. 1970) the Court noted that its supervisory function in review of agency decisions "begins with enforcement of the requirement of reasonable procedure with fair notice and opportunity to the parties to present their case", and "continues into examination of the evidence and the agency's findings of facts, for the court must be satisfied that

the agency's evidentiary fact findings are supported by substantial evidence, and provide rational support for the agency's inference of ultimate fact." 444 F.2d at 850. The Court went on to say:

> "Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or by-passing of the mandate in the legislative charter, but more broadly if the court becomes aware that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." 444 F.2d at 851.

Even where a statute authorizes informal discretionary action by an administrative agency the Court of Appeals has required findings and reasons to support such discretionary action. In *Environmental Defense Fund v. Ruckelshaus* 439 F.2d 584 (D.C. Cir. 1971) the Court, in reviewing an administrative refusal to suspend the registration of DDT, declared that the Administrator "has an obligation to articulate the criteria that he develops in making each individual decision. We cannot assume in the absence of adequate explanation that proper standards are implicit in every exercise of administrative discretion." The Court went on to say that: "Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Discretionary decisions should more often be supported with findings of fact and reasoned opinions." 439 F.2d at 597.

The Court has repeatedly held that an administrative finding must state with clarity and completeness the facts and conclusions essential to support the agency order. Findings of fact should be made specifically and

should be a recitation of the basic facts established by the evidence, from which may be inferred the ultimate facts in terms of the statutory criteria required as a basis for a particular order. A mere finding of ultimate facts or a conclusionary statement without a finding of the underlying facts cannot be deemed sufficient to support agency action. *Saginaw Broadcasting Co. v. FCC* 96 F.2d 554, cert. den. 305 U.S. 613 (1938); *American Broadcasting Co. v. FCC* 179 F.2d 437 (D.C. Cir. 1949); *Nat. Geographic Society v. Unemployment Compensation Board* 438 F.2d 154 (D.C. Cir. 1970); *Environmental Defense Fund v. Hardin* 428 F.2d 1093 (D.C. Cir. 1970).

Unless a written finding of fact precedes the making of the order the agency is in a position to "back into" an order through the expedient of drafting findings of fact to support a proposed order previously issued. *USV Pharmaceutical Corp. v. Secretary of HEW* 466 F.2d 455 (D.C. Cir. 1972). In that case the Secretary of HEW adopted a summary procedure for issuance of orders withdrawing FDA approval of drugs determined to not have the effect they are represented to have. Under the Secretary's summary procedure the FDA Commissioner issued notice that he proposed to withdraw approval of certain drugs manufactured by the petitioner USV Pharmaceutical Corp., and stated in such notice that he would give any party who may be adversely affected by such order an opportunity for hearing to produce evidence as to why such approval should not be withdraw. HEW's procedural regulations provided that where it appears from the data submitted with a request for a hearing that no genuine and substantial issue of fact exists the Commissioner could

proceed to enter a final order withdrawing approval of the drugs in question. The Court of Appeals held this procedure "fundamentally defective", and stated the following reasons:

> "The Commissioner acted pursuant to 21 C.F.R. §130.14, the regulation establishing a summary judgment procedure for the Food and Drug Administration. This regulation is modeled after Rule 56 of the Federal Rules of Civil Procedure, the summary judgment rule of the federal district courts. As counsel for the government stated at oral argument, the agency's procedure is analagous to the procedure under Rule 56. A vital distinction, however, is that the Commissioner here was not an impartial arbiter of the contentions of opposing parties, but was himself the moving party undertaking to support his own proposed order.
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> "Under [Rule 56] the moving party has the burden of presenting evidence that establishes his right to summary judgment as a matter of law; and he may not, by the bare assertion that he is entitled to summary judgment, shift to his opponent the burden of establishing the contrary. *Evers v. Buxbaum*, 102 U.S.App.D.C. 334, 253 F.2d 356 (1958); *Washington Post Co. v. Keogh*, 125 U.S. App.D.C. 32, 365 F.2d 965 (1966).
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> "The Commissioner's notice of January 23, 1968 and his notice of July 10, 1968 parroted the language of the statute without reference to any evidence. In short, at no time did the Commissioner set forth the facts and reasons upon which he relied in reaching his conclusion that no material issue of fact existed. We think that such an application of the Commissioner's summary

judgment rule is not in harmony with the principle of the rule and is fundamentally unsound and unfair." 466 F.2d 455 (1972) at 460, 461.

The procedure declared invalid in *USV Pharmaceutical* is analagous to the penalty assessment procedures followed under Part 100. Under Part 100 the Secretary's assessment officer is not an impartial arbiter but is himself "the moving party undertaking to support his own proposed order", and without reference to any evidence he issues a *pro forma* conclusory finding of fact to support his assessment order only after that order has become final.

It is evident that in its decision in the present case the Court of Appeals disregarded its oft-repeated insistence that findings of fact "are not mere procedural niceties", but are essential to effective judicial review to determine whether agency decisions comply with statutory standards. Here the Court went off on a tangent, holding that an operator's failure to request a hearing "suggests that he does not dispute the fact of violation nor disagree with the appropriateness of the specific penalty proposed", and in such a case "We do not believe that Section 109(a) (3) requires the Secretary to prepare a formal decision which merely would consist of the same information already contained in the proposed assessment order." 494 F.2d at 991.

This latter assertion underscores the error of the Court's ruling. The record in the district court showed that proposed assessment orders were issued on a preprinted form[13] containing no factual description of

[13] Appendix pp. 46, 47.

the alleged violation, no finding that the violation had in fact occurred, no information showing whether and in what manner the six statutory criteria had been applied for purposes of determining the penalty amount, or anything else that would show that a considered determination had been made. On the basis of the record the district court found that the proposed assessment order gave the operator "no notice of what facts under the statutory criteria entered into determination of a violation or a proposed penalty, and thus no basis on which to know whether he should or should not object, either as to the violation or the penalty." 357 F.Supp. at 513.[14]

Proceeding on its erroneous assumption that the operator's failure to request a hearing indicates that no disputed issues exist, the Court of Appeals rationalized that under Section 109(a) (3) the Secretary "need not prepare a formal decision where there is no dispute and the operator evidences his satisfaction with the proposed penalty by choosing not to request a hearing" 494 F.2d at 992. In support of this conclusion the Court cited *FPC v. Texaco* 377 U.S. 33, 12 L.Ed. 112 (1964); *Denver Union Stockyard v. Producers Livestock Assn.* 356 U.S. 282, 2 L.Ed. 2d 771 (1958); *United*

[14] Commenting on this same point in the *Delta Mining Co.* case, *supra*, The Third Circuit Court of Appeals noted that "the proposed assessment orders in this case contained *no* 'information' other than *pro forma* recitations that the six criteria for determining penalty amounts had been considered. Thus, findings of fact in these cases would provide the operators with information they had not yet received, information to which, under our view of the Act they are entitled." 495 F.2d at 44, (emphasis in original).

States v. Storer Broadcasting Co. 351 U.S. 192, 100 L.Ed. 1081 (1956); *Weinberger v. Hynson, Westcott and Dunning* 412 U.S. 609, 37 L.Ed. 2d 207 (1973).

A review of these cited cases shows that they are not pertinent to the issues here presented. The *Texaco* and *Storer Broadcasting Co.* cases involved, in substance, a challenge to agency rule-making authority. In *Texaco* this Court held that where an agency properly promulgates standards under which licenses may be issued it is not necessary for the agency to proceed on a case-by-case basis to provide hearings on applications which on their face do not meet such standards. *Storer Broadcasting* was decided on the same grounds. There the FCC denied a broadcaster's license application without a hearing because the applicant already owned and operated the maximum number of television stations permitted under the FCC rules. In the *Denver Union Stockyard* case it was held that the Secretary of Agriculture was not obligated to hold a hearing on a complaint by a marketing agency on a rule of the Stockyard Association which was invalid and void on its face. *Weinberger v. Hynson, Westcott and Dunning* is directly adverse to the conclusion reached by the Court of Appeals here. In that case this Court held that the FDA improperly denied a hearing on an application for approval of a new drug, and vacated the FDA Commissioner's order withholding approval of the drug.

Thus, the decision of the Court of Appeals here is not in fact supported by the cases cited in its opinion.

THE COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF THE LEGISLATIVE HISTORY OF THE ACT

In support of its conclusion that absent a request by the operator for a hearing the Secretary is not required to make findings of fact, the Court of Appeals adverted to the legislative history of Section 109(a) (3), and reached a result wholly inconsistent with the plain words of the statute as enacted. Although petitioners contend there is no warrant for going behind the unequivocal language of Section 109(a) (3), they are convinced that an objective reading of the legislative history shows that Congress did not intend to authorize assessment of penalties under summary procedures such as those utilized under the Part 100 regulation, and, in fact, refused to adopt language recommended by the Department of the Interior to this effect.

At the time this legislation was being considered by Congress in 1969 the Interior Department submitted recommendations in the form of draft bills which were introduced as the so-called Administration Bills, S. 1300 and H.R. 7976. The penalty assessment procedures proposed in such bills would authorize the Secretary to issue a penalty assessment order solely on the basis of a charged violation, and would allow the mine operator thirty days from receipt of such order to request a hearing by a board to be known as the Federal Coal Mine Health and Safety Board of Review. The pertinent language appeared in section 113 of S. 1300 and H.R. 7976 as follows:

> "Section 113.(a) The operator of a coal mine in which a violation occured of a mandatory health

or safety standard promulgated under this title may by order be assessed a civil penalty by the Secretary which penalty shall be not more than $10,000 for each occurence of a violation of a mandatory health or safety standard.

* * *

(b) Upon written request made by an operator within thirty days after receipt of an order assessing a penalty under this section, the Board shall afford such operator an opportunity for a hearing and, in accordance with the request, determine by decision whether or not a violation of a mandatory health or safety standard did occur and whether the amount of the penalty is warranted or should be compromised."

The bill ultimately approved by the House (H.R. 13950) retained a portion of this language, but added at the end of subsection (a) a clause reading "No penalty shall be assessed under this subsection pending the final termination, expiration, or completion of all proceedings, administrative, or judicial, for review of an order or decision under this title." The House bill also substituted the word "Secretary" for the word "Board" in subsection 113(b).[15]

The bill approved by the Senate (S. 2917) retained none of the language proposed by the Administration bills. It provided:

"Section 308(a) (3) An order assessing a civil penalty under this subsection shall be issued by the Secretary only after the person against whom

[15]Legislative History Federal Coal Mine Health and Safety Act, compiled by the Committee of Education and Labor, House of Representatives, March 1970, p. 932.

the order is issued has been given an opportunity for a hearing and the Secretary has determined by decision incorporating findings of fact based on the record of such hearing whether or not a violation did occur and the amount of the penalty, if any, which is warranted. Section 554 of Title 5 of the United States Code shall apply to any such hearing and decision."[16]

The respective bills were referred to a Senate-House Conference Committee and the bill approved by the conferees retained the substance of the Senate language respecting penalty assessments, but slightly rephrased the wording from "by decision incorporating findings of fact based on the record of such hearing whether or not a violation did occur . . ." to read "by decision incorporating his findings of fact therein, that a violation did occur . . .". The Conference Report gave no explanation for the changed wording, but simply stated:

Both the Senate bill and the House amendment provided an opportunity for a hearing in assessing such penalties, but the Senate bill required a record hearing under 5 U.S.C. 554. The conference substitute adopts the Senate provision with the added provision that where appropriate, such as in the case of an appeal from a withdrawal order, an effort should be made to consolidate the hearings. The commencement of such proceedings, however, shall not stay any notice or order involving a violation of a standard."[18]

[16]Legislative History, p. 546.

[18]Legislative History, p. 1033.

The Conference Committee bill was subsequently approved by both Houses, and signed into law by the President on December 30, 1969.

The Secretary argued in the Court of Appeals that the deletion of the words "on the record of such hearing" should be construed as indicating a congressional intent that "a decision incorporating his findings of fact" is required only where a hearing is held. The Court of Appeals accepted this argument, and by a curiously inverse process of reasoning concluded: "In view of the *explanation* provided by the Report of the Conference Committee, we cannot conclude that Congress intended to disapprove the more specific procedure outlined in the administration bills." 494 F.2d at 994; emphasis added.

The Third Circuit Court of Appeals considered this same point in the *Delta Mining Co.* case, and concluded:

> "Nothing in [the legislative] history convinces us, however, that any departure from the plain import of the statutory terms is warranted. There is not a modicum of evidence in the reports from either House of Congress, nor in the Conference Committee report on the compromise bill that became section 109, that would indicate an intent to dispense with findings of fact where no hearing is requested." 495 F.2d at 41-42.

The Third Circuit's assessment of the legislative history is accurate. One looks in vain for any evidence that the plain words of section 109(a) (3) were intended to mean anything other than what they say.

THE ACT DOES NOT PROVIDE FOR ASSESSMENT OF PENALTIES BY DEFAULT

In a footnote to its opinion the Court of Appeals suggested that the part 100 procedure "is analogous to the procedure in civil litigation where a defendant who fails to answer a complaint may have a default judgement entered against him. Federal Rules of Civil Procedure 55."[19]

This analogy is a superficial one, which does not stand up under critical examination. The assessment officer's proposed assessment order is in no sense comparable to a complaint in a civil action wherein the moving party spells out the various factual allegations upon which he relies in seeking judgement, and submits his cause to an independent and impartial judicial authority. Under Part 100 the assessment officer takes upon himself the combined role of moving party and deciding authority, and sets up his own rules under which his "complaint" becomes his own final judgement.

The established principles of administrative law which we have heretofore discussed do not permit government agencies to issue decrees in this manner. They require, instead, that agency orders be adequately supported by reasoned determinations and findings of fact so that effective judicial review of such orders is possible. In this respect administrative law does not allow for default judgements in the manner authorized in judicial proceedings under the Federal Rules of Civil Procedure.

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[19] 494 F.2d at 992, fn. 32.

The Secretary has not been unaware of correct administrative procedure. As previously noted, he originally adopted procedural rules under which assessment proceedings were initiated by the filing of a petition for assessment with the Interior Department Board of Mine Operations Appeals,[20] a copy of the petition was served upon the operator who was then required by the rules to file an answer within 30 days,[21] and in the event of his failure to file a timely answer the Hearing Examiner or Administrative Law Judge could assume the truth of the facts alleged in the petition for assessment and proceed to make findings respecting the occurence of the charged violations and to determine the amount of the penalty taking into account the criteria specified in section 109(a) of the Act.[22] By following this procedure the Secretary can properly provide for summary disposition of uncontested cases, and at the same time meet the procedural standards of the Act and the requirements for effective judicial review.

The Secretary cannot be heard to complain that the fact finding requirement of the Act are too cumbersome to deal with the large volume of penalty cases. If this is a valid complaint it should be addressed to Congress with a request for authority to use summary procedures. He has no authority under the existing law to disregard the procedural requirements of section 109(a) (3).

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[20] 30 C.F.R. Part 301, section 301.50; subsequently recodified as 43 C.F.R. Part 4, section 4.540.

[21] 43 C.F.R. section 4.541.

[22] 43 C.F.R. section 4.544.

CONCLUSION

The district court properly found that the Secretary exceeded his statutory authority by adopting the Part 100 procedures, and that such procedures are in conflict with the express requirements of section 109 of the Act. The Court of Appeals was in error in reversing and setting aside the judgment of the district court, and its ruling should be reversed.

Respectfully submitted,

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